No. 89-1985

IN THE

Supreme Court of the United States

October Term, 1989

CALIFORNIA DIVISION OF
APPRENTICESHIP STANDARDS;
GAIL W. JESSWEIN,
Chief of the Division of Apprenticeship Standards;
CALIFORNIA APPRENTICESHIP COUNCIL;
and NORTHERN CALIFORNIA BOILERMAKERS
LOCAL JOINT APPRENTICESHIP COMMITTEE,
Petitioners,

v.

HYDROSTORAGE, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the State of California's conduct in enforcing California Labor Code section 1777.5 as applied in this case is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*?

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PARTIES TO THE PROCEEDING

The named Appellants in the United States Court of Appeals for the Ninth Circuit were the California Division of Apprenticeship Standards ("DAS"); Gail W. Jesswein, Chief of the Division of Apprenticeship Standards; the California Apprenticeship Council; and the Northern California Boilermakers Local Joint Apprenticeship Committee ("JAC").

The Appellee in the Court of Appeals was Hydrostorage, Inc., a Tennessee corporation. Hydrostorage, Inc. is a wholly owned subsidiary of the Pitt-Des Moines, Inc. Pitt-Des Moines has no parent corporation. Pitt-Des Moines's non-wholly owned subsidiaries are Oregon Culvert Co., Inc. and Canadian Des Moines Industries Limited.

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The Respondent, Hydrostorage, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 891 F.2d 719.

COUNTERSTATEMENT OF THE CASE[1]

I

STATEMENT OF THE CASE

In summary, Hydrostorage is a Tennessee corporation which performs public works projects in various states including California. Hydrostorage is not signatory to an agreement with the Boilermakers Union and the Boilermakers Union has never been certified as the bargaining representative of its employees. Pursuant to California Labor Code section 1777.5, the Division of Apprenticeship Standards and the other Petitioners in this action attempted to force and require Hydrostorage to participate in the apprenticeship training program operated by the Boilermakers Union. Petitioners sought to compel Hydrostorage to execute an agreement to train apprentices with the Boilermakers apprenticeship program (known as a DAS-7) and to employ apprentices referred from the Boilermakers hiring hall in accordance with the Boilermakers apprenticeship program. The Boilermakers apprenticeship program would require Hydrostorage to employ one apprentice for every five journeymen on the job. The DAS-7 agreement to train apprentices also sets the wages, hours and working conditions for apprentices, incorporating by reference the terms and conditions of the local collective bargaining agreement negotiated by the Boilermakers Union and various union signatory companies.

There was a serious question presented as to whether the project in question was of sufficient size to meet the statutory minimum for the employment of apprentices. Nonetheless, Hydrostorage was fined and debarred for its failure to submit a DAS-7 form and a request for approval to train apprentices from the apprenticeship program operated by the Boilermakers Union. Hydrostorage challenged the actions of the Division of Apprenticeship Standards and the other Petitioners on the grounds that such state law

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[1] Hydrostorage, Inc. ("Hydrostorage") adopts the Statement of the Case found in the opinion of the United States Court of Appeals for the Ninth Circuit at *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), which is reprinted in the separately bound appendix to Petitioner's certiorari petition (hereafter referred to as "Pet. App.") at pages 2a-9a.

mandates are preempted by ERISA and on the further ground that the actions of the Petitioners were no more than an attempt to force Hydrostorage to become bound involuntarily to the results of collective bargaining by the Union. The District Court ruled in favor of Hydrostorage on both issues. The Ninth Circuit upheld the decision of the District Court on the issue of ERISA preemption and did not reach the question of NLRA preemption.

A. The Decision Below.

In *Hydrostorage*, the Ninth Circuit summarized ERISA's connection to apprenticeship as follows:

> ERISA governs "employee benefit plans," which are statutorily defined as plans that are either an "employee welfare benefit plan," an "employee pension benefit plan," or both (29 U.S.C. § 1002(3); *Morash*, 109 S.Ct. at 1672). The statute defines "employee welfare benefit plan" as follows: "*any plan, fund, or program* which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance *or otherwise*, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services. . . ." (29 U.S.C. § 1002(1); emphasis added). [Footnote omitted.]
>
> ERISA contains a very broad preemption clause. Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . . (29 U.S.C. § 1144(a) (emphasis added).) "State laws" are defined as "all laws, decisions, rules, regulations

> or other State action having the effect of law, of any State." (29 U.S.C. § 1144(c)(1).) A "state" is defined as "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." (29 U.S.C. § 1144(c)(2).)

Hydrostorage, 891 F.2d at 726, Pet. App. at pp. 14a-15a.

After setting forth the above-quoted statutory basis, the Ninth Circuit concluded that the case before it involved an ERISA plan. Under authority of *Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213, 1217 (9th Cir.), *aff'd*, U.S. , 109 S.Ct. 210 (1988), and the parties' stipulation, the court easily concluded that the Boilermakers apprenticeship trust fund is an ERISA plan. The court also separately held that the written Apprenticeship Standards which set out the terms and conditions of the Boilermakers apprenticeship program constitutes an employee benefit plan under ERISA. *Hydrostorage, supra*, Pet. App. pp. 17a-19a.

After concluding that the case does involve ERISA covered employee benefit plans, the court then reviewed whether the administrative order challenged was a "state law" that "relate[s] to" such a plan. Pet. App. at 21a. The court quickly determined that the order was a "state law" under ERISA. *Id.* The court went on to conclude that the order "clearly 'relates to' the Standards, which are part of an ERISA plan." *Id.* at p. 22a. The order penalized Hydrostorage for failing to sign the DAS-7 agreement under which Hydrostorage would have been bound to the Boilermakers Apprenticeship Standards. As such, the court concluded that "the order undoubtedly 'relates to' an ERISA plan in the sense that the order has a 'connection with or reference to' the Standards." *Id.* The court also found that the order " 'purports to regulate, indirectly or directly,' an ERISA plan." *Id.* It stated:

> Again, the order's purpose is to require Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan.

> [Citation] The order is designed to enforce the terms of an ERISA plan. The same is true of the statute upon which the order is based, California Labor Code § 1777.5. *Section 1775.5 is aimed at enforcing the terms of an ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans.* The underlying statute is therefore one which is specifically designed to affect employee benefit plans. [Citation.] We therefore conclude that the administrative order falls within ERISA's preemption clause.

Id. at pp. 22a-23a (emphasis added).

Finally, the court concluded that ERISA section 514(d) did not save the order from preemption. *Id.* at 24a-28a. That section, codified at 29 U.S.C. § 1144(d), states that courts should not construe ERISA "to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." In particular, the court rejected a claim that the state apprenticeship standards had been incorporated into the federal regulatory scheme under the Fitzgerald Act, 29 U.S.C. § 50. *Id.* at 25a. In reaching its conclusion, the Ninth Circuit adopted the district court's reasoning. *Id.* The district court summarized:

> The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. (29 U.S.C. § 50.) The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration for certain Federal purposes, [of] acceptable apprenticeship programs." (29 C.F.R. § 29.1(b).) Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; Section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired."

Pet. App. at p. 38a.

II

SUMMARY OF ARGUMENT

Petitioners seek review of the decision below on fundamentally three grounds. First, Petitioners contend that this Court should grant review in order to resolve an alleged conflict in the circuits as to whether the standard for ERISA preemption requires that statutes not only relate to, but also purport to regulate ERISA plans. As set forth in full below, there really is not a conflict in the circuits. Rather, Petitioners have relied upon theories asserted several years ago which have since been called into serious question, if not eradicated by subsequent decisions of this Court. More to the point, this issue is irrelevant to this case. It is unquestionable that the statute here not only relates to ERISA plans but also purports to regulate them. Accordingly, under either test the state law at issue here would be preempted. Thus, the distinction is irrelevant and cannot provide a basis for review.

The second issue raised by Petitioners is whether the state law at issue here is indeed a "regulation" or whether it simply constitutes an exercise of choice by the state as to which contractors it chooses to do business with. As discussed in full below, this so-called "market participation" argument fails for two reasons. First, it is factually inaccurate. The statute at question here does not involve eligibility for bidding but rather direct regulation of contractors in the performance of public works projects. In fact, the statute in question does not even come into effect until *after* the contracts are already let. The regulatory scheme involves ongoing monitoring by the state and encompasses penalties such as fines and debarment orders which are totally inconsistent with Petitioner's so-called "market participant" theory. Moreover, the precise argument Petitioners raise has been squarely rejected by this Court in *Wisconsin Dep't of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282 (1986).

Finally, Petitioners argue that the state law at issue here is saved from preemption by the existence of a federal statute, the Fitzgerald Act. Even a cursory glance at the Fitzgerald Act reveals the frivolous nature of this argument. The

Fitzgerald Act is only four sentences in length and has no substantive provisions at all. It is simply a general policy statement acknowledging the benefits of apprenticeship programs. It was also enacted some 37 years before ERISA and can hardly be viewed as a Congressional limitation on the scope of ERISA. The federal regulations on which Petitioners rely are also irrelevant here. According to their terms, these regulations are established for the sole purpose of setting out federal labor standards concerning apprentices and the only role of the state is as an agent for the federal government in verifying compliance with these federal standards and registering programs for the U.S. Department of Labor. Most significantly nothing in the federal law requires or even hints at the requirement set out by the state law here. As this Court held in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), a state statute which is enacted under the umbrella of a federal enabling act is safe from preemption only to the extent that it is a mechanism for enforcing the affirmative requirements of federal law. Where as here the state statute imposes requirements not imposed by federal law, those requirements are subject to preemption. Thus, the federal law exemption argument is likewise without merit.

III

REASONS WHY THE PETITION SHOULD BE DENIED

A. Neither The Decision Below Nor The Record Raises The First Question Presented In The Petition.

The first Question Presented in the Petition (page (i)) is:

> Whether the states are precluded by the preemption provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1144, from requiring that public works contractors agree to provide training opportunities for apprentices in accord with state-prescribed standards.

The Ninth Circuit, however, did not decide that question in this proceeding and the record here will not support a determination of that question in this case. The Ninth Circuit explained:

> We conclude that the Council's order is not saved from preemption by Section 514(d) of ERISA. We also hold that as applied in the Council's order, [Labor Code] Section 1777.5 is not saved from ERISA preemption. However, like the district court, we do not address whether Section 1777.5 in its entirety is preempted by ERISA. 685 F. Supp. at 723.

Pet. App. at pp. 27a-28a. The Ninth Circuit did not even find that the statute in question, California Labor Code section 1777.5, was preempted, but only that as it was applied in this case it was preempted. Id. Put simply, the Ninth Circuit did not reach the question of whether and to what extent states are precluded by the preemption provisions of ERISA from requiring that public works contractors agree to provide apprenticeship training in accordance with state-mandated standards.

To invoke this Court's Article III powers, Petitioners must demonstrate standing in a constitutional sense. To demonstrate its standing, Petitioners must allege and prove three elements: (1) personal injury; (2) fairly traceable to the Defendants' allegedly unlawful conduct; and (3) likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The record here does not permit resolution of the first Question Presented by the Petitioners because the order below is limited to the enforcement mechanisms of California Labor Code section 1777.5 as they were applied in this case. Here, the state did not simply set minimum standards for employment and training of apprentices. It mandated that a particular benefit be provided, it selected the specific union-sponsored program in which Hydrostorage was compelled to participate and mandated by regulation and by enforcement of the Standards every detail of employment and training of

apprentices. This is not a minimum standards requirement but a mandated program dictated in its every detail by the state. It is this mandate that the employer sign an agreement with and participate in a specific program selected by the state which was held to be preempted. The record in this case is barren of any issue as to whether ERISA preempts states from setting generally applicable minimum employment requirements on public works projects. Thus, the first "Question Presented" argued by Petitioners simply cannot be resolved in the context of this case. The first Question Presented is nothing more than a pure hypothetical which was neither presented by the facts of this case nor discussed in the courts below.

B. The "Purports to Regulate" Question Raised By Petitioners Runs Directly Contrary To The Well Established Decisions Of This Court And Is Completely Irrelevant To This Action.

Petitioner devotes four pages to the argument that the decision below should be reviewed in order to "resolve the substantial confusion that has developed in the court of appeals law over the proper role—and the proper construction—of ERISA section 514(c)(2) in preemption litigation generally." Pet. at p. 11. The issue Petitioner refers to is whether or not a statute must not only "relate to" but also must "purport to regulate" ERISA plans for ERISA preemption to apply.

The attempt to insert this additional requirement into the standard for ERISA preemption is directly contrary to numerous decisions of this Court. As this Court pointed out in Shaw, 463 U.S. at 96-98, the statutory test is simply whether the state law in question "relates to" an employee benefit plan:

> Congress used the words "relate to" in Section 514(a) in their broad sense. To interpret Section 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder of Section 514.

* * *

> A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or a reference to such a plan.

The narrowing of the standard proposed by Petitioners here, requiring that the statute also "purport to regulate" ERISA plans, flies in the face of this simple and straightforward standard. Furthermore, it is clear that this Court has never applied such a limitation. For example, in a very recent decision, *Mackey v. Lanier Collections Agency and Service, Inc.*, 486 U.S. 825 (1988), a unanimous Supreme Court held that a state statute which exempted ERISA benefit funds from garnishment was preempted by ERISA. Such a statute does not "purport to regulate" ERISA plans and, indeed, was an attempt to protect and exclude ERISA plans from state regulation. Nonetheless, the statute was held preempted because, like the state law in question here, it made specific reference to and was specifically designed to affect ERISA plans. Id. at 829. Thus, the "confusion" which Petitioners assert simply does not exist. A statute which relates to ERISA plans is preempted and there is no requirement that it also "purport to regulate" such plans.[2]

Even more significantly, the distinction itself is irrelevant in this case because, as the court below quite properly found, the order challenged here meets the "purports to regulate" test. Under the narrowest application of the statute urged by Petitioners, the order would still be preempted by ERISA because it undeniably "purports to regulate" apprenticeship plans.

This Court in its summary affirmation of *Local Union 598, Plumbers & Pipefitters Journeymen and Apprentices Training Fund v. The J. A. Jones Construction Co.*, 846 F.2d

[2] The strained statutory construction upon which Petitioners rely is simply without merit. The "purports to regulate" language is drawn from the definition of a state agency. It is not part of the preemption section of ERISA. It is set out in the definitions of terms. More significantly, the term that Section 514(c)(2) defines ("state" as opposed to "state law") is not used in Section 514(a). The definition of a state as opposed to a state law is simply not an issue in interpreting Section 514(a). Accordingly, Petitioners' entire argument is essentially an irrational reading of the statutory language.

1213 (9th Cir.), aff'd, U.S. 109 S. Ct. 210 (1988), resolved this same issue as to a very similar statute. In *J. A. Jones,* the Ninth Circuit specifically held that ERISA preempts the State of Washington's prevailing wage law which required contributions to an apprenticeship training fund because such mandatory participation "purports to regulate" ERISA benefits. The statute and the plan were very similar to those presented in *Hydrostorage.* In *J. A. Jones,* the Ninth Circuit concluded:

> However, the strength of the state interest is of no consequence where the state law clearly "purports to regulate" an employee benefit plan. "In order to avoid being preempted, a state law in addition to being an exercise of traditional police powers must also affect the plan" in too tenuous, remote, or peripheral a manner to warrant a finding that "the law relates to" the plan. Gilbert, 765 F.2d at 327 (quoting Shaw, 463 U.S. at 100 n.21, 103 S. Ct. at 2901, n.21). Such, assuredly, is not the case here.
>
> * * *
>
> In conclusion, the clear and express purpose of Washington Revised Code section 39.12.010(3) is to govern employee contributions to employee benefit plans, including apprenticeship training plans. The statute on its face "purports to regulate" employee benefit plans.

Id. at 1221.

In the decision below, the Ninth Circuit explained:

> Second, *we conclude that the administrative order "purports to regulate, indirectly or directly," an ERISA plan. Again, the order's purpose is to require Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan. See Metropolitan Life [Insurance Co. v. Massachusetts],* 471 U.S. [724,] 739, 105 S. Ct. at 2388 (Massachusetts law requiring ERISA plans to provide minimum coverage for mental health care expenses "bears indirectly but substantially" on plans since "it requires them to purchase the mental-health benefits specified in the statute"). *The order is*

> *designed to enforce the terms of an ERISA plan. The same is true of the statute upon which the order was based, California Labor Code 1777.5. Section 1777.5 is aimed at enforcing the terms of an ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans. The underlying statute is therefore one which is specifically designed to affect employee benefit plans.* [Citation omitted.] We therefore conclude that the administrative order falls within ERISA's preemption clause.

Pet. App. at pp. 22a-23a (emphasis added).

A law "purports to regulate" an employee benefit plan if it attempts "to reach in one way or another" the "terms and conditions of employee benefit plans." *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984) (quoting 29 U.S.C. section 1144(c)(2)). It is clear that by mandating Hydrostorage to participate in the Boilermakers' apprenticeship program and comply with the Boilermakers' Apprenticeship Standards in the course of performance of public contracts, the State of California is "reaching in one way or another" the terms and conditions of an employee benefit plan. Failure to comply with these requirements subject the Respondent to a fine and a debarment order. California Labor Code section 1777.5 obliges employers to make contributions and to follow the other terms of the apprenticeship plan which is enforced by a state administrative agency, the Division of Apprenticeship Standards ("DAS"). The DAS undertakes ongoing regulation during the completion of the public work project of the number of apprentices and the terms and conditions under which they are employed. It cannot be disputed that this constitutes administrative regulation by the state.

Thus, in the decision below, Petitioners have already received the benefit of what they perceive to be the narrow "purports to regulate" analysis. Accordingly, the distinction Petitioners urge is irrelevant here. The order at issue here is preempted under either test.

C. There Is No Conflict Between The Circuits Which Would Affect The Decision Below.

Petitioners have also failed to show any conflict or real confusion among the circuits concerning whether the standards for ERISA preemption are affected by the definition of a state agency set out in Section 514(c)(2). In support of their argument that the definition of a state agency set out in Section 514(c)(2) should be read to limit the scope of ERISA preemption under Section 514(a), Petitioners rely primarily upon three cases, two from the Ninth Circuit and one from the Second Circuit, decided in 1984 and 1986. Hydrostorage submits that the reasoning of these cases has clearly been overruled by more recent decisions of this Court which have held that the test is simply whether the state statute "relates to" ERISA plans and not whether the statute also "purports to regulate" such plans. The holdings in all of the recent decisions of this Court substantially undermine, if not eradicate, the theories discussed in the older decisions upon which Petitioners rely. *See Mackey,* 486 U.S. 825; *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987); *Pilot Life Insurance Company v. Dedeaux,* 481 U.S. 41 (1987); *Metropolitan Life Insurance Company v. Taylor,* 481 U.S. 58 (1987). All of the other decisions upon which Petitioners rely simply hold, in agreement with the Ninth Circuit Court of Appeals in *J.A. Jones,* 846 F.2d 1213, that any statute which regulates ERISA benefits, by definition, also relates to the plans. *See, e.g., Stone and Webster Engineering Corporation v. Ilsley,* 690 F.2d 323 (2d Cir. 1982), *aff'd sub nom., Arcudi v. Stone and Webster Engineering Corp.,* 463 U.S. 1220 (1983). Thus, the asserted "conflict between the circuits" is non-existent. The few older decisions supporting the "purports to regulate" limitation are of questionable validity and the entire theory appears to have been abandoned, at least in practice, by the more recent decisions of this Court and the courts of appeal.

The most Petitioners can muster concerning the "disarray" and "confusion" among the circuits is the following:

> The Sixth Circuit, *without deciding the question,* has criticized the view that "purports to regulate" language of section 514(c)(2) provides a substantive

> limitation on the scope of section 514(a). [Citation omitted.]

Pet. at p. 14 n.12 (emphasis added). Such a tenuous disagreement on an issue which is not even relevant to the outcome below can hardly provide a proper ground for review by this Court.

Petitioners' attempt to distinguish this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), is unavailing. *See* Petition at p. 12 n. 9. In *Alessi*, this Court explained the scope of ERISA section 514(c)(2) as follows:

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern. For the purposes of the preemption provision, ERISA defines the term "State" to include: "a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. section 1144(c)(2) (emphasis added.) ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision.

Id. at 525 (emphasis in original).

Similarly, the State of California's attempt to impose the terms and conditions of an ERISA plan, in this case collectively bargained Apprenticeship Standards, upon nonsignatory contractors must, at minimum, be said to be a statute indirectly regulating such ERISA plans.

D. Petitioners' "Market Participant" Theory Is Without Merit And Has Previously Been Rejected By This Court.

Petitioners argue that their actions in connection with Hydrostorage and indeed all of Labor Code Section 1777.5 are not a "regulation" but simply reflect the state exercising

freedom of choice as to which contractors it chooses to deal with. In rejecting this "market participant" argument, the Ninth Circuit explained:

> First, as the Supreme Court observed in rejecting a similar argument in a case involving NLRA preemption, *Wisconsin Department of Industry, Labor and Human Relations v. Gould,* 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986), "the 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." Id. at 289, 106 S. Ct. at 1062; *see also id.* at 290, 106 S. Ct. at 1063 ("what the Commerce Clause would permit states to do in the absence of the NLRA is . . . an entirely different question from what states may do with the Act in place.")

Pet. App. at 23a.

Petitioners' "market participant" argument completely misses the point. Although California is a party to contracts in the public works market, it is also engaged in active regulation of public works contractors. As a review of Labor Code Section 1777.5 reveals, it is designed to regulate conduct and does not even purport to set qualifications for bidders. By mandating that after executing a contract to perform a public works project, Hydrostorage must sign an agreement with, participate in, and make contributions to the Boilermakers apprenticeship plan, the State is regulating the Company's conduct.

Further, the "market participation" argument ignores the fact that debarment is not the only penalty. Section 1777.7 provides for fines and other penalties for non-compliance.

The argument also ignores the fact that Section 1777.5 subjects the employer to mandatory ongoing obligations. The employer has an ongoing statutory obligation to make contributions and to follow the other terms of the plan which is enforced by a state administrative agency, the DAS. The DAS is not an awarding body and does not award or enter into public works contracts. Rather, the role of the DAS is solely to regulate the conduct of public works contractors with regard to apprenticeship. The DAS undertakes ongoing

regulation of the number of apprentices and the terms under which they are employed. Such ongoing administrative regulation can hardly be characterized as a simple market choice between one contractor and another. Indeed, the provisions of section 1777.5 *by their terms do not take effect until after the contract has been awarded.* In short, Petitioners' contention that the State of California's debarring Hydrostorage and *assessing fines* against Hydrostorage are no more than "market participation" by the State of California stands reason on its head. Moreover, numerous courts have rejected such arguments, holding that where a state conditions doing business with a private entity on compliance with statutory requirements it is regulating conduct.

Finally, this "market participation" argument has been squarely rejected by this Court. Petitioners dance in and around this Court's decision in *Gould*, 475 U.S. 282, without ever fully quoting the most pertinent part of that decision:

> In any event, the "market participant" doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted. In addition to authorizing congressional action, the Commerce Clause limits state action in the absence of federal approval. . . . The NLRA, in contrast, was designed in large part to "entrust administration of the labor policy for the nation to a centralized administrative agency." *Garmon*, 359 U.S. at 242, 79 S. Ct. at 778. . . . *What the Commerce Clause would permit States to do in the absence of the NLRA is thus an entirely different question from what states may do with the Act in place.* . . . [G]overnment occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. . . . The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play.

Id. at 289-290 (emphasis added) (citations omitted).

What the Commerce Clause would permit states to do in the absence of ERISA is an entirely different question from what states may do with the Act in place. By mandating that Hydrostorage participate in the Boilermakers' apprenticeship program, the State of California is regulating employee benefit plans, a form of state regulation prohibited by the express terms of ERISA. Accordingly, as this Court held in *Gould*, and as the Ninth Circuit held below, Petitioners' market participation argument is without merit.

Even according to Petitioners' own analysis, the "market participant" exception does not apply here. Petitioners argue that the three principles in *Gould* are: (1) Congressional purpose based on an examination of the statute in question; (2) whether the state has a legitimate procurement purpose; and (3) maintaining a national marketplace in which parties can freely operate. Pet. at pp. 17-18.

Petitioners' market participation argument must fail under all of these three "principles" gleaned by Petitioners from this Court's decision in *Gould*. First, the Congressional intent that ERISA preempt "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" is beyond question. In *Franchise Tax Bd. of The State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 24 n.26 (1983), this court explained:

> In addition, ERISA's legislative history indicates that, in light of the Act's virtually unique pre-emption provision, see section 514, 29 U.S.C. § 1144, "A body of federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Senator Javits).

Again, in *Shaw*, 463 U.S. 85, this Court quoted the legislative history of ERISA:

> Representative Dent, for example stated:
>
> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation. 120 Cong. Rec. 29197 (1974)."

Id. at 99. It is thus clear that the Congressional purpose in enacting ERISA was to reserve the regulation of employee benefits to federal authority. *Id.*

As to the second principle, Labor Code section 1777.5 cannot plausibly be defended as a legitimate response to State procurement constraints or to local economic needs. Labor Code section 1777.5 is regulation, pure and simple. Moreover, its admitted purpose is to promote apprenticeship which the State views as a valuable social goal. It is neither the mere expression of "local economic needs" nor is it simply a "procurement restraint." It is not a business decision but rather an exercise of police power to further the State's social objectives.

Under the third principle, preserving the enforcement of Labor Code section 1777.5 as applied in this case would not further the interests of the "national market-place." Each state under Petitioners' theory would be given free reign to set its own terms and conditions for participation in apprenticeship plans. As Senator Javits explained during the legislative debate over ERISA, "[t]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private employee benefit programs." 120 Cong. Rec. 29,942 (1974) (remarks of Senator Javits) (quoted in *Shaw*, 463 U.S. at 99-100 n.20). Furthermore, preemption of state laws regulating employer contributions to employee welfare plans serves the Congressional purpose of "eliminating the threat

of conflicting or inconsistent state and local regulation of employee benefit plans." 120 Cong. Rec. 29,933 (1974) (remarks of Senator Williams) (quoted in *Shaw*, 463 U.S. at 99). Thus, the goal of national uniformity and a free market place is served, not hindered, by preemption of inconsistent state regulations.

E. ERISA Section 514(d) And The Fitzgerald Act Do Not Save California Labor Code Section 1777.5 From Preemption As *Applied In This Case.*

ERISA Section 514(d) clarifies the scope of ERISA preemption as follows:

> Nothing in this Title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in section 111 and 507(b)) or any rule or regulation issued under any such law.

29 U.S.C. § 1144(d).

Thus, Section 514(d) makes clear that ERISA preempts only state laws and not federal laws. To be protected from preemption under 514(d), Labor Code Section 1777.5 would have to be elevated to the status of a federal law. Nothing presented by Petitioners suggests any appropriate basis for doing so. Nevertheless, Petitioners devote numerous pages of briefing to the exclusion in a frantic attempt to make ERISA Section 514(d) the *deus ex machina* that will save Labor Code Section 1777.5 from preemption.

Petitioners lead us down the slippery slope of their argument by first extolling the virtues of apprenticeship. Petition at p. 9. Petitioners then argue that a federal statute known as the Fitzgerald Act (29 U.S.C. § 50) saves Labor Code § 1777.5 from preemption relying on ERISA Section 514(d)—the federal law savings clause. Petition at pp. 23-26. In other words, Petitioners argue that the Fitzgerald Act transforms Labor Code Section § 1777.5 into a federal law. Even a cursory glance at the Fitzgerald Act reveals the frivolous nature of this argument. The Fitzgerald Act is only

four sentences in length and has no *substantive provisions at all.* It is simply a general policy statement acknowledging the benefits of apprenticeship programs. It was also enacted in 1937, some 37 years before ERISA. Thus, it can hardly be viewed as an intentional Congressional limitation on the scope of ERISA and its "virtually unique preemption provision." *Franchise Tax Board,* 463 U.S. at 24 n.26.

Likewise, the federal regulations on which Petitioners place so much reliance are irrelevant here. According to their own terms, the regulations are established for the purpose of setting forth *federal labor standards* concerning apprentices and to "extend the application of those standards by prescribing policies and procedures concerning *registration for certain federal purposes,* of acceptable apprenticeship programs, with the U.S. Department of Labor. . . ." 29 C.F.R. § 29.1(b) (emphasis added). The regulations do not, as Petitioners imply, give the states *carte blanche* or indeed any authority to establish independent apprenticeship requirements. Rather, the regulations establish *federal* standards for apprenticeship programs which control the circumstances under which an apprenticeship program may be registered with the U.S. Department of Labor. The only state function is to act as the agent of the federal government in verifying compliance with these *federal* standards and in registering the programs with the U.S. Department of Labor. Further, and more significantly, there is no mandatory federal requirement. The federal regulations do not require any employer to have an apprenticeship program or authorize any state to impose such a requirement. Thus, because Section 1777.5 has nothing to do with federal registration of apprenticeship programs, the regulations on which Petitioners rely are irrelevant for purposes of the federal law savings clause. Further, nothing in the federal law requires or even hints at mandatory participation by employers.

This Court in *Shaw,* 463 U.S. 85, in analyzing ERISA's federal law exclusion under 514(d), observed:

> ERISA's structure and legislative history, while not particularly illuminating with respect to section 514(d), caution against applying it too expansively.

> As we have detailed above, Congress applied the principle of preemption "in its broadest sense to foreclose any non-federal regulation of employee benefit plant," creating only very limited exceptions to preemption. 120 Congressional Record 29197 (1974) (remarks of Representative Dent); *see id.*, at 29933 (remarks of Senator Williams).
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> While section 514(d) may operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive preemption provision and its enumeration of narrow, specific exemptions to that provision makes us reluctant to expand section 514(d) into a more general saving clause.

Id. at 104.

Thus, it is well established that where a state statute is enacted under the umbrella of a federal enabling act, it is saved from preemption by Section 514(d) of ERISA only to the extent that it is a mechanism for enforcing the affirmative requirements of federal law. Where, as here, the state statute imposes requirements not imposed by the federal law, those requirements are subject to preemption.

Further, the fact that overall Congressional policy recognizes the benefits of well-run apprenticeship programs does not give the states leave to regulate in pursuit of that goal. In *McMahon v. McDowell,* 794 F.2d 100 (3d Cir.), *cert. denied,* 479 U.S. 971 (1986), the Third Circuit rejected a similar argument based on the asserted laudable goals of the state law which was clearly in conformance with overall federal policy. The court ruled: "*Shaw and Metropolitan Life* make it very clear that state laws relating to a covered plan, even those that are arguably consistent with the goals of ERISA, are preempted by Section 514(a), 29 U.S.C. 1144(a)." Id. at 108. As this Court held in *Mackey v. Lanier,* 486 U.S. at 830, a state law is not saved by "legislative good intentions."

This Court in *Shaw*, 463 U.S. 85, concluded its analysis of ERISA Section 514(d) by observing:

> To the extent that our construction of ERISA causes any problems in the administration of state fair employment laws, those problems are the result of Congressional choice and should be addressed by Congressional action. *To give section 514(d) the broad construction advocated by appellants would defeat the intent of Congress to provide comprehensive preemption of state law.*

Id. at 106 (emphasis added).

The Ninth Circuit and the district court in their opinions below, forcefully dismissed the argument that Section 514(d) saved Section 1777.5 from preemption:

> By no stretch of the imagination could section 1777.5 be considered a state law the preemption of which would impair federal law. The Fitzgerald Act merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices' and related objectives. 29 U.S.C. § 50 . . . the regulations relate only to eligibility for federal registration. Neither they nor the act itself contemplate enforcement mechanisms
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> *_*_*
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> Accordingly, it must be concluded that section 514(d) does not save the order issued under section 1777.5 from ERISA preemption.

Pet App: 25a; 38-39a.

Petitioners' argument that state statutes that "go beyond federal minimums" are not necessarily preempted by ERISA (Pet. at p. 24) was expressly rejected by this Court in *Shaw*. This position was reiterated in *Mackey v. Lanier*, 486 U.S. at 829-830, where the Supreme Court explained:

> [t]he preemption provision [of section 514(a)] . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. *Metropolitan Life Insurance Co. v. Massachusetts,*

> *supra,* 471 U.S. at 739, 105 S. Ct. at 2389 . . . legislative "good intentions" do not save a state law within the broad preemptive scope of section 514(a).

The analysis by Petitioners contrasting the Job Training Partnership Act and the Occupational Safety and Health Act to the Fitzgerald Act and to Labor Code Section 1777.5 is meaningless because there is no issue of ERISA preemption involved in the former situation. The argument is a blatant attempt to draw this Court's attention away from the extensive body of law concerning the only issue involved in this case, the scope and interpretation of ERISA Section 514(a). The court in *Solomon v. Klein,* 770 F.2d 352 (3d Cir. 1985), rejected an attempt to argue by analogy with respect to ERISA by examining Congressional intent concerning some other statute. It ruled:

> The method of analogy is, of course, a legitimate method of reaching of a decision. But in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute.

Id. at 354-355.

Moreover, the impact of Petitioners' theory would be to create a statutory exception to ERISA for apprenticeship programs. In essence, adoption of this completely novel theory would erase the term "apprenticeship" from the definition of "employee welfare benefit plans" set forth in Section 3(1) of ERISA. Not only is this a ridiculous statutory construction but the Ninth Circuit Court of Appeals and the United States Supreme Court have held apprenticeship plans to fall within the scope of ERISA and ERISA preemption. *See J.A. Jones,* 846 F.2d at 1217. Certainly a policy statement enacted 37 years before ERISA cannot be deemed to modify ERISA's plain language.

Contrary to the impression Petitioners attempt to create, it is clear that Congress specifically chose not to provide a general exemption from preemption for state apprenticeship

regulation. Congress chose to provide such exceptions for state laws which regulate insurance banking and securities and for generally applicable criminal laws (*see* ERISA Section 514(b)). ERISA also exempts from its coverage governmental plans, church plans, and plans maintained solely for the purpose of complying with applicable workers' compensation, unemployment compensation or disability insurance laws (*see* ERISA Section 4(b)). However, nowhere does ERISA provide any type of exception for state regulation of apprenticeship. Because it is obvious that Congress carefully considered the concept of providing exceptions to preemption and chose not to except apprenticeship programs, this Court is not free to add such an exception by judicial fiat. As the Court noted in *Shaw*, 463 U.S. at 104 "the combination of Congress' enactment of 514(a)'s all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision militate against expanding § 514(d) into a more general savings clause." Thus, Petitioners' argument that the existence of the National Apprenticeship Act indicates a Congressional intent to permit the states to regulate apprenticeship notwithstanding the broad preemptive effect of ERISA is without merit.

IV

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the judgment below should be affirmed.

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Respectfully submitted,

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